(29,686)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 376

STATE OF MISSOURI EX REL. THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

WILSON A. TAYLOR, JUDGE OF THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 10, 1923

[fol. 1] IN THE

SUPREME COURT OF MISSOURI, APRIL TERM, 1923

En Banc

No. 23417

STATE OF MISSOURI at the Relation and to the Use of the ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, Relator,

vs.

WILSON A. TAYLOR, Judge of the Circuit Court of the City of St. Louis, Respondent.

PRÆCIPE FOR TRANSCRIPT OF RECORD

To Hon. J. D. Allen, Clerk of the Supreme Court of Missouri:

In obedience to the command of the writ of error issued in said cause from the Supreme Court of the United States to the Supreme Court of the State of Missouri, on the 28th day of May, 1923, you will please send to the Supreme Court of the United States as commanded in said writ, the following record of the proceedings and matters in said cause, to-wit:

1. Petition for Writ of Error.

2. Writ of Error and your return endorsed on same.

3. Assignment of Errors.

4. Citation to Respondent and acknowledgment of service on said citation.

5. Transcript of record filed in said cause, including the petition or application for prohibition, and including also the exhibits referred to and included in said application, marked "Exhibits A," "B," "C" and "D."

6. Return of Respondent, Taylor, to the Writ of Prohibition.

[fol. 2] 7. Motion for judgment.

8. Opinion of the Court En Banc.

9. Dissenting opinion of Graves, Judge.

10. Relator's Motion for Re-hearing and Suggestions in Support thereof.

11. Order overruling Motion for Re-hearing.

12. Order of Missouri Supreme Court on petition for Writ of Error, ordering said Writ.

13. Bond on Writ of Error.

State ex Rel. St. Louis, Brownsville and Mexico Railway Company (Plaintiff in Error), By Edward J. White, James F. Green, Attorneys.

Receipt of a copy of the foregoing Præcipe is hereby acknowledged this 28th day of May, 1923.

Leahy, Saunders & Walther, Attorney- for Respondent (Defendant in Error).

[fol. 2½] [File endorsement omitted.]

[fol. 3] IN THE SUPREME COURT OF MISSOURI, APRIL TERM, 1923

En Banc

[Title omitted]

PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME

Your Petitioner, the State of Missouri, presenting this application on behalf of the St. Louis Brownsville and Mexico Railway Company, respectfully states, that on the 30th day of April, 1923, the Supreme Court of the State of Missouri entered in the above-entitled cause its final order and judgment in favor of the above-named respondent and against this petitioner, in which final order and judgment and the proceedings theretofore had in this cause petitioner avers certain errors were committed to the prejudice of this petitioner, all of which will more in detail appear from the assignment of errors hereto attached and made a part hereof; that the Supreme Court of the State of Missouri is the highest court of said State of Missouri in which the decision in this matter could be had.

Wherefore, your petitioner prays a Writ of Error from the Su-
[fol. 4] preme Court of the United States may issue in its behalf to the Supreme Court of the State of Missouri for the correction of the errors so complained of, and that a transcript of record, proceedings and papers in this cause duly authenticated may be sent to the Supreme Court of the United States.

Dated this 23rd day of May, 1923.

Edward J. White, James F. Green, Attorneys for Petitioner (Plaintiff in Error). Merrit N. Hayden, Thomas T. Railey, Of Counsel.

Writ of Error allowed in the above-entitled cause upon the execution of a bond on behalf of petitioner in the sum of One Thousand Dollars, said bond when approved to act as a supersedeas herein.

Dated this 23rd day of May, 1923.

A. M. Woodson, Chief Justice Supreme Court of Missouri.

[fol. 4½] [File endorsement omitted.]

[fol. 5] IN THE SUPREME COURT OF MISSOURI, APRIL TERM, 1923

En Banc

[Title omitted]

WRIT OF ERROR

The President of the United States to the Judges of the Supreme Court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in the case of State of Missouri at the relation and to the use of the St. Louis, Brownsville and Mexico Railway Company, as Relator, against Wilson A. Taylor, Judge of the Circuit Court of the City of St. Louis, Respondent, Case No. 23417, in the said Supreme Court before you, said court being the highest court of law or equity in said State wherein a decision could be had, final judgment having been rendered April 3, 1923 and relator's motion for re-hearing having been overruled April 30, 1923; manifest error is alleged to have happened, to the damage of said relator, as by its complaint appears.

Now, therefore, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, we do command you that under your seal, [fol. 6] you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C. not exceeding thirty (30) days from and after the date of the citation in said cause in the said Supreme Court, to be then and there held, that the record and proceedings being inspected the said Supreme Court may cause further to be done therein to correct said error, according to the laws and customs of the United States, what of right should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States this 28th day of May, 1923.

Issued at office in the City of Jefferson, with the seal of the District Court of the United States for the Central Division of the Western District of Missouri on the date last aforesaid.

Edwin R. Durham, Clerk of the United States District Court, Western District of Missouri, Central Division, By F. J. Fr—, D. C. [Seal of the United States District Court, Central Division, Western District of Missouri.]

This Writ of Error allowed.

A. M. Woodson, Chief Justice of the Supreme Court of Missouri.

[fol. 7] STATE OF MISSOURI, sct:

IN THE SUPREME COURT OF MISSOURI

RETURN TO WRIT OF ERROR

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, in obedience to the mandate of the within writ of error, and in conformity with the præcipe for record, herewith transmit to the Honorable Supreme Court of the United States a true and complete transcript of the record and proceedings in the cause entitled State of Missouri, at the relation and to the use of the St. Louis, Brownsville and Mexico Railway Company, Relator, vs. Wilson A. Taylor, Judge of the Circuit Court of the City of St. Louis, Respondent, No. 23,417, so far as called for by the said præcipe, and as fully as the same remain of record and on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said Supreme Court, at my office in the City of Jefferson, State aforesaid, this 8th day of June, 1923.

J. D. Allen, Clerk of the Supreme Court of the State of Missouri. [Seal of the Supreme Court of Missouri.]

[fol. 8] IN THE SUPREME COURT OF MISSOURI, APRIL TERM, 1923

En Banc

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the State on behalf of the St. Louis, Brownsville and Mexico Railway Company, as Petitioner for Writ of Error as set out in its petition which is hereto attached, and respectfully submits, that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Missouri in the above-entitled cause, there is manifest error in this, to-wit:

I

That the decision of the Supreme Court is in violation of Paragraph 3 of Section 8 of Article I of the Constitution of the United States, delegating to Congress the power to regulate commerce between the several States, in this, to-wit: that Congress, through the Carmack Amendment, has taken jurisdiction over all matters relating to loss or damage to interstate freight, thereby superseding the State laws and regulations with respect thereto, and that the Supreme Court of Missouri in permitting a plaintiff to resort to the State statutes in order to maintain a suit against said non-resident Railway Company, thereby adding to and supplementing substantial

rights afforded by the Federal statute and denying to the Railway Company substantial rights afforded it under the Federal law, has [fol. 9] contravened the rule announced in the following authoritative decisions, to-wit:

Railway Co. v. Varnville, 237 U. S., 604.
Railway Co. v. Winfield, 244 U. S., 153.

II

Because the Supreme Court of Missouri erred in holding that although the right of the American Fruit Growers, Inc. to sue the St. Louis, Brownsville and Mexico Railway Company arose and accrued under Federal law, to-wit, the Carmack Amendment to the Interstate Commerce Act, and although the said Railway Company was not a resident of Missouri and had no agent in the State on whom personal service could be had, a suit could be maintained against it under the attachment laws of said State.

III

Because the Supreme Court of Missouri, in holding that the bringing in of a non-resident defendant by attachment and without personal service involved only a matter of procedure as opposed to substantial or substantive rights, denied to the St. Louis, Brownsville and Mexico Railway Company the substantial right afforded it by the Federal law to have said suit tried in a jurisdiction where personal service could be had upon it, and in so holding, said Supreme Court of Missouri denied to said Railway Company the equal protection of the law, and such holding is a taking of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

IV

Because said Supreme Court in treating as a mere matter of procedure the attachment of the property by the St. Louis, Brownsville and Mexico Railway Company, a non-resident defendant, without personal service upon it in a suit based upon the Carmack Amendment to the Interstate Commerce Act, ignored and directly contravened the principles announced in the following decisions, to-wit:
[fol. 10] Pryor v. Williams, 254 U. S., 43.
Ry. Co. v. White, 238 U. S., 511.
Ry. Co. v. Gray, 241 U. S., 338.
Pratt v. Ry. Co., 284 Fed. Rep. 1007.

V

Because the Supreme Court of Missouri erred in holding that the provision of the Carmack Amendment to the effect "that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law" preserve to the shipper the right to resort to the State statutes

for the purpose of maintaining by attachment a suit against a non-resident defendant upon whom no personal service has been obtained in an action for loss and damage to interstate freight, and in so holding, the Supreme Court of Missouri directly contravened the following authoritative decisions, to-wit:

Southern Express Co. v. Byers, 240 U. S., 612.
Adams Express Co. v. Croninger, 226 U. S., 503.
Lysaght v. Lehigh Valley R. Co., 254 Fed., 351.

Edward J. White, James F. Green, Attorneys for Petitioner (Plaintiff in Error). Merrit N. Hayden, Thomas T. Railey, of Counsel.

[fol. 10½] [File endorsement omitted.]

[fol. 11] IN THE SUPREME COURT OF MISSOURI, APRIL TERM, 1923

En Banc

[Title omitted]

CITATION AND SERVICE

The United States of America to Wilson A. Taylor, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., not exceeding thirty days from and after the date this citation bears date, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Missouri wherein the said State at the Relation of the St. Louis, Brownsville & Mexico Railway Company, is Plaintiff in Error and you are Defendant in Error, to show cause, if any, there be, why the judgment rendered against said Plaintiff in Error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

In testimony whereof, I, A. M. Woodson, Chief Justice of the Supreme Court of Missouri have hereto signed my name this 23rd day of May, A. D. 1923.

A. M. Woodson, Chief Justice.

Copy of the above citation received May 28th, 1923.
Leahy, Saunders & Walther, Attys. for Deft. in Error.

[fol. 11½] [File endorsement omitted.]

[fol. 12] UNITED STATES OF AMERICA,
State of Missouri, ss:

Be it remembered that heretofore, to-wit, on the 30th day of September, 1922, there was filed in the office of the clerk of the Su-

preme Court of the State of Missouri, in a cause between State of Missouri, at the relation and to the use of the St. Louis, Brownsville & Mexico Railway Company, Relator, and Wilson A. Taylor, Judge of the Circuit Court of the City of St. Louis, Respondent, No. 23,417, the transcript of the record in said cause, which said transcript of record is in the words and figures following, to-wit:

IN THE SUPREME COURT OF MISSOURI, OCTOBER TERM, 1923

In Banc

[Title omitted]

Transcript of Record

Relator filed its application for a writ of prohibition against respondent, who is one of the Judges of the Circuit Court of the City of St. Louis. This application (caption and signatures omitted) is as follows:

APPLICATION FOR WRIT OF PROHIBITION

Your petitioner presents to this court its application for a writ of prohibition against respondent, who is Judge of the Circuit Court [fol. 13] of the City of St. Louis, Missouri, presiding in Division No. 1 of that Court, and for its cause of action states that it is a railway corporation duly organized and existing under and by virtue of the laws of another state than the State of Missouri; is a nonresident of the State of Missouri; has its principal place of business within the State of Texas, and only operates a line of railroad in said State of Texas:

That the American Fruit Growers, Inc., is a corporation existing under and by virtue of the laws of some State other than the State of Missouri and maintains an office for the transaction of business in said City of St. Louis;

That heretofore, to wit, on or about the 13th day of June, 1921, there was filed in the Circuit Court of the City of St. Louis, Missouri, a petition in a certain cause, No. 46,156, in which American Fruit Growers, Inc., was plaintiff and The St. Louis, Brownsville & Mexico Railway Company was defendant, in which said cause on or about the last named date there was also filed an affidavit wherein it was set out that The St. Louis, Brownsville & Mexico Railway Company was a nonresident of the State of Missouri, and also on or about December 2nd, 1921, an alias writ of attachment was issued in said cause, whereby on the date last mentioned the Illinois Central Railroad Company was summoned as garnishee and whatever goods, chattels, moneys, effects, rights, credits, choses in action and evidences of debt in the possession of said Illinois Central Railroad Company, garnishee, and belonging to The St. Louis, Brownsville & Mexico Railway Company were attached by the Sheriff of the said City of St. Louis by virtue of the alias writ of attachment herein-

[fol. 14] before referred to, as will more fully apear by certified copies of the petition, affidavits in attachment, alias writ of attachment and return of the Sheriff of the said City of St. Louis on said alias writ of attachment. all of which are herewith attached, and marked "Exhibits A, B, C and D," and made a part of this application;

That The St. Louis, Brownsville & Mexico Railway Company, defendant in said suit No. 46156, was at all times a common carrier of freight and passengers for hire over its own line and lines of other carriers known as connecting carriers between points on its own lines and points on the lines of such connecting carriers in all of the states within the United States, and was at all such times engaged in interstate commerce and the transportation of freight and passengers from one state into another state of the United States;

That the damages prayed for in the petition filed in said case No. 46156 grow out of certain shipments of freight originating on the line of The St. Louis, Brownsville & Mexico Railway Company in the State of Texas and destined to Pittsburgh, Pennsylvania, Cleveland, Ohio, and St. Louis, Missouri, respectively, and each of said shipments, in order to reach its final destination, moved over other lines of railroad than the line of railroad of The St. Louis, Brownsville & Mexico Railway Company and through other states than the State of Texas, and said shipments in moving to their final destinations moved over the lines of railroad hereinbefore referred to as connecting carriers.

Your petitioner says, further, that The St. Louis, Brownsville & [fol. 15] Mexico Railway Company, as required by law, issued what is known as a through bill of lading, covering each shipment hereinbefore referred to, by virtue of the provisions of which said shipment was to be transported by means of the initial carrier and connecting carriers from points of origin to final destinations;

That at the time The St. Louis, Brownsville & Mexico Railway Company, as initial carrier, undertook the transportation of the shipments mentioned in the petition in said case No. 46156, there was in force and effect an Act of Congress, approved January 29th, 1906, Chap. 3591, par. 7, 34 State. at Large, 584, known as the Carmack Amendment to the Interstate Commerce Act, by which it was provided:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed. Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

Further, your petitioner says that it is not alleged in the petition [fol. 16] filed in said case No. 46156, where the alleged damage to the shipments therein referred to occurred on the line of the initial carrier or lines of connecting carriers over which said shipments moved in order to reach final destination.

Further, your petitioner shows to the Court that in said case No. 46156, pending in the Circuit Court of said City of St. Louis, there has been no service of process on the defendant therein, The St. Louis, Brownsville & Mexico Railway Company, and said defendant has not entered its appearance in said cause nor filed any pleadings therein, but that the plaintiff in said cause, without the service of process on the defendant therein and without the appearance of the defendant in said cause, is attempting by virtue of the provisions of the laws and statutes of the State of Missouri, and by a proceeding in attachment under and by virtue of the laws of said State of Missouri, to subject the money and property of the defendant in said cause to the satisfaction and payment of said alleged cause of action set forth in the petition therein, and by means of a garnishment issued in aid of such attachment to subject whatever moneys that may be owing by the Illinois Central Railroad Company to the defendant in said cause to the satisfaction of said alleged cause of action.

Also, your petitioner alleges that by virtue of the remedy given against the initial carrier by the terms of the act of Congress above referred to, suit cannot be maintained in the jurisdiction of state in which personal service of process cannot be had upon said initial carrier, unless it is alleged in the petition that the loss or damage on account of which suit is brought occurred while the shipments were [fol. 17] in the actual possession of said initial carrier and that the right of attachment given by the statutes of the State of Missouri against nonresidents has no application, such attachments not being allowed as a Federal remedy unless personal service is had upon the nonresident defendant.

Your petitioner also avers that inasmuch as the shipments mentioned in the petition filed in the Circuit Court of said City of St. Louis are interstate shipments, the liability of the defendant in that action as an initial carrier is measured by the laws of the United States and remedies provided by the different acts of Congress applicable thereto, and not by the laws of the State of Missouri or by any statute enacted by or in force in said state.

Therefore, it is shown to this Court by your petitioner that inasmuch as the shipments set out in the petition in said case No. 46,156, pending in the Circuit Court of said City of St. Louis, are interstate in character; that said shipments, in order to reach final destinations, moved through different states and over other lines of railroad than operated by the St. Louis, Brownsville & Mexico Railway Company; that no personal service of process has been had upon the defendant in said suit No. 46,156; that the defendant in said last-named suit has neither entered its appearance nor filed any pleading therein; that it is not alleged in the petition in said case No. 56,156 that the

loss or damage on account of which this suit is brought occurred while said shipments, or any of them, were in the actual possession of the defendant in said suit; that whatever remedy the plaintiff in said suit No. 46,156 may have is a Federal remedy only, and that the [fol. 18] provisions of the statutes of the State of Missouri in the matter of attachments against nonresidents of said state are not open to plaintiff in said suit No. 46,156 as a Federal remedy, the Circuit Court of the City of St. Louis, Missouri, has no jurisdiction either of the subject of the action or the person of the defendant in said suit No. 46,156.

Your petitioner avers that, notwithstanding that said Circuit Court of said City of St. Louis is without jurisdiction of the person of the defendant or the subject of the action in said case No. 46156, Hon. Wilson A. Taylor, Judge of Divison No. 1 of said Circuit Court, is attempting to exercise jurisdiction in said cause No. 46156 in that respondent is about to permit plaintiff in said cause to file interrogatories; require the garnishee therein to answer said interrogatories, and to permit the plaintiff in said cause to subject whatever properties or effects in the hands and possession of said garnishee to be subjected to the payment of any judgment plaintiff may recover in said cause after said plaintiff shall have compiled wth the provisions of the statutes of the State of Missouri in the matter of attachments against the property of those not residing within the State of Missouri, and that to permit the Hon. Wilson A. Taylor to attempt to exercise jurisdiction in said cause would, in view of the matters and things hereinbefore alleged, be a denial to petitioner of the equal protection of the laws and would be the taking of the property of your petitioner without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Your petitioner avers that it is without adequate remedy in the [fol. 19] premises to prevent the unlawful exercise of jurisdiction by respondent in said cause other than by prohibition to be issued by this Honorable Court.

Wherefore, your petitioner pays that this Honorable Court will issue against the respondent, Wilson A. Taylor, Judge of the Circuit Court of the City of St. Louis, Missouri, its writ of prohibition restraining and preventing him from hearing or taking further cognizance or action in said cause of American Fruit Growers, Inc., v. St. Louis, Brownsville & Mexico Railway Company, No. 46156, pending for hearing before said respondent, and that said respondent, pending the final hearing of this cause, be prohibited and restrained from taking any cognizance or action in said suit pending before him, and that upon final hearing of this cause said prohibition against respondent may be made absolute.

[fol. 20] EXHIBIT "A" TO APPLICATION FOR WRIT OF PROHIBITION

STATE OF MISSOURI,
City of St. Louis, ss:

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, OCTOBER TERM, 1921

No. 46156. Div. No.—

AMERICAN FRUIT GROWERS, INC., Plaintiff,

vs.

THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, a Corporation, Defendant

PETITION

Plaintiff states that it is a corporation duly organized according to law and as such was engaged in the business of buying and selling fruits and vegetables, and in the course of its business shipped large quantities of such fruits and vegetables over the railroad lines of various railway companies, and more particularly over that of the defendant.

Plaintiff further states that the defendant is and at all times hereinafter mentioned was a railroad corporation and common carrier, organized and existing under and by virtue of the laws of the State of Texas, and was engaged, among other things, in the transportation of fruits and vegetables over its lines through the State of Texas.

Plaintiff, for its cause of action, states that on or about the 30th day of April, 1920, one George A. Arts, as consignor, in the City of [fol. 21] La Feria, Texas, placed in the possession of the defendant, for a valuable consideration, as a common carrier under an agreement, for transportation a carload of bulk cabbage in good, sound, merchantable condition, weighing about twenty-nine thousand six hundred thirty pounds (29,630); that the said cabbage had been sold by the said consignor to the plaintiff as consignee. That the said cabbage was transported by the said defendant in Northern Pacific car 94604, with destination as Pittsburgh, Pa.

Plaintiff further states that in violation of its common-law duty as a common carrier the defendant transported the said shipment of cabbage so negligently and carelessly that the said carload of cabbage arrived at its destination at Pittsburgh, Pa., spoiled, deteriorated and decayed, so that it was useless and unmerchantable, and the plaintiff was unable to realize anything on the same in the cabbage market; that by reason of the premises the plaintiff sustained a loss in the sum of one thousand twenty-eight dollars and five cents ($1,028.05). The market value of the said cabbage, in good, sound and merchantable condition on the day of its arrival at Pittsburgh, Pa., was one thousand twenty-eight dollars and five cents ($1,028.05); that by reason of the fact that the said cabbage was worthless and unmerchantable because of the violation of the said defend-

ant of its said common-law duty, the plaintiff was deprived of the said sum of one thousand twenty-eight dollars and five cents ($1,028.05), with interest, for which sum, together with its costs, it prays judgment.

[fol. 22] Count II

Plaintiff, for another and further cause of action herein, adopts and makes part of this cause of action paragraphs one and two, as set out in count one.

Plaintiff, for a second cause of action herein, states that on or about the 20th day of April, 1920, George A. Arts, of Mercedes, Texas, placed in the possession of the defendant, for a valuable consideration, as a common carrier, a carload shipment of bulk cabbage in good, sound, merchantable condition, weighing about twenty-five thousand seven hundred fifty-six (25,756) pounds, at Mercedes, Texas. That the said car was designated as car Lehigh Valley 36016, and the said car was transported to Cleveland, Ohio, by the said defendant. That this plaintiff had purchased the said carload of cabbage and was the consignee under the said shipment.

Plaintiff further states that in violation of its duty as a common carrier, and because of the carelessness and negligence of the defendant, the said carload shipment of cabbage arrived at its destination at Cleveland, Ohio, in a yellow, deteriorated and decayed condition, so that a large part of it was useless and unmerchantable, thereby forcing this plaintiff to sell the said carload of cabbage for the sum of three hundred dollars ($300.00); that the market price of similar cabbage of like grade and quality in good, sound, merchantable condition on the day of the arrival of the said shipment of cabbage at Cleveland, Ohio, namely, May 8, 1920, was nine hundred four dollars sixty-one cents ($904.61). That by reason of the said violation of the defendant of its common-law duty and of its negligence and carelessness, the plaintiff was forced to sell the [fol. 23] said carload of cabbage at a loss of six hundred four dollars sixty-one cents ($604.61), for which sum, together with interest and costs of this suit, the plaintiff prays judgment.

Count III

Plaintiff, for another and further cause of action herein, adopts and makes part of this cause of action paragraphs one and two, as set out in count one.

Plaintiff, for a third cause of action herein, states that on or about the 21st day of January, 1921, Hodge and Howell, of Harlington, Texas, placed in the possession of the defendant, for a valuable consideration, as a common carrier, a carload shipment of carrots, beets, cabbage, lettuce and spinach, in good, sound, merchantable condition, consisting of twenty-four (24) crates of cabbage, thirty-two (32) baskets of carrots, twenty-three (23) crates of beets, seventy-one hampers (71) of lettuce, two hundred twenty (220) hampers of spinach, and eighteen (18) crates of carrots. That the said car

was designated as A. R. T. 9271, for transportation to St. Louis, Missouri. That this plaintiff had purchased said car of cabbage, carrots, beets, lettuce, and spinach, and was the consignee under said shipment.

Plaintiff further states that in violation of its duty as a common carrier, and because of the negligence and carelessness of the defendant, as hereinafter set out, the said carload of vegetables arrived at its destination in a spoiled, deteriorated and unmerchantable condition, and that the plaintiff was forced to sell said cabbage, carrots, beets, lettuce and spinach at a loss of three hundred thirty dollars [fol. 24] and twenty-two cents ($330.22). That the reasonable and fair market value of twenty-seven (27) crates of cabbage on the day of its arrival at St. Louis in good, sound, merchantable condition would have been five dollars ($5.00) per crate, but because of its condition plaintiff was forced to sell same for seventy dollars and seventy-two cents ($7-.72). That the reasonable and fair market value of thirty-three (33) baskets of carrots on the day of its arrival at St. Louis in good, sound, merchantable condition would have been nineteen dollars and twenty cents ($19.20), but because of its condition plaintiff was forced to sell same for seventeen dollars and twenty cents ($17.20). That the reasonable and fair market value of twenty-four (24) crates of cabbage on the day of its arrival at St. Louis in good, sound, merchantable condition was fifty-four dollars ($54.00), but because of its condition plaintiff was forced to sell same for forty-one dollars and ninetey-two cents ($41.92). That the reasonable and fair market value of seventy-one (71) hampers of lettuce on the day of its arrival at St. Louis in good, sound, merchantable condition was one hundred eighteen dollars and ninety-two cents ($118.92), but because of its condition plaintiff was forced to sell same for sixty-four dollars and eighty cents ($64.80). That the reasonable and fair market value of two hundred twenty (220) hampers of spinach on the day of its arrival at St. Louis in good, sound, merchantable condition was two hundred nine dollars ($209.00), but because of its condition plaintiff was forced to sell same for fifty-five dollars thirty-one cents ($55.31). That the reasonable and fair market value of sixty-six (66) baskets of beets on the day of its arrival in good, sound, merchantable condition was [fol. 25] eighty-two dollars and fifty cents ($82.50), but because of its condition plaintiff was forced to sell same for sixty-two dollars ($62.00).

Wherefore, by reason of all the above, plaintiff prays judgment in the sum of three hundred thirty dollars twenty-two cents ($330.22), together with interest and cost of this suit.

The total amount prayed for in the above three counts is one thousand nine hundred sixty-two dollars and eighty-eight cents ($1,-962.88).

EXHIBIT "B" TO APPLICATION FOR WRIT OF PROHIBITION

STATE OF MISSOURI,
City of St. Louis, ss:

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, OCTOBER TERM, 1921

No. —. Div. —

AMERICAN FRUIT GROWERS, INC., Plaintiff,

vs.

THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, a Corporation, Defendant

Affidavit for Attachment

J. W. Willem, agent and attorney in fact for American Fruit Growers, Inc., of legal age, being duly sworn, states that he is the agent and attorney in fact for American Fruit Growers, Inc., that the said American Fruit Growers, Inc., has a just demand and claim against the within named defendant, the St. Louis, Brownsville & Mexico Railway Company, a corporation, as set forth in the above [fol. 26] petition, and that the amount which the said deponent believes the plaintiff ought to recover after allowing all just credits and set-offs is the sum of one thousand nine hundred sixty-two dollars and eighty-eight cents ($1,962.88), with interest thereon; that the said defendant is a foreign corporation and not a resident of the State of Missouri, and the said defendant cannot be served in this state in the manner prescribed in the Revised Statutes of Missouri, 1919, but that the said defendant is a corporation whose chief office or place of business is out of the State of Missouri, to wit, in the State of Texas.

(Signed) J. N. Willem.

Sworn to and subscribed before me this 11th day of June, 1921. My commission expires February 25, 1923. (Signed) Lillie A. Wolf, Notary Public, City of St. Louis, Mo. (Seal.)

A true copy.
Attest: Nat Goldstein, Clerk. (Seal.)

[fol. 27] EXHIBIT "C" TO APPLICATION FOR PROHIBITION

Sheriff Directed to Attach Railway Company's Property

CITY OF ST. LOUIS:

The State of Missouri to the Sheriff of the City of St. Louis, Greeting:

We again command you to attach The St. Louis, Brownsville & Mexico Railway Company, a corporation, by all and singu-

lar its lands, tenements, goods, chattels, rights, moneys, (Seal.)
credits, evidences of debt and effects, or so much thereof as
shall be sufficient to satisfy the plaintiff's claim as sworn to, to wit, the sum of one thousand nine hundred sixty-two dollars and eighty-eight cents, with interest and costs of suit, in whose hands or possession soever the same may be found in your bailiwick, and that you summon the said The St. Louis, Brownsville & Mexico Railway Company, a corporation, to appear at the next term of the Circuit Court before the Judges thereof, on the first day of said term, to be holden at the City of St. Louis, on the first Monday of February next, then and there to answer the action of the plaintiff, American Fruit Growers, Inc., as set forth in the annexed petition, and also that you summon as garnishees all persons in whose hands or possession soever any personal property, rights, credits, evidences of debt, effects or money of the defendant may be, or who may be named by the plaintiff or its attorney as garnishees, and particularly —— ——, that they be and appear before the Judges of our said court on the [fol. 28] first day of the term aforesaid, then and there to answer unto what may be objected against them, and have you then and there this alias writ.

Witness, Nat Goldstein, clerk of our said court, with the seal thereof hereunto affixed, at office in City of St. Louis, this 2nd day of December, in the year of our Lord nineteen hundred and twenty-one.

Nat Goldstein, Clerk. (Seal.)

EXHIBIT "D" TO APPLICATION FOR PROHIBITION

Sheriff's Return

No goods, chattels or real estate found in the City of St. Louis, Mo., belonging to the within named defendant, St. Louis, Brownsville & Mexico Railway Co., a corporation, whereon to levy the writ hereto attached and make the debt and costs, or any part thereof; thereupon, by order of the attorney for plaintiff, I executed said writ, in said City of St. Louis, at the hour of 8 o'clock and 40 minutes, a. m., on the 3rd day of December, 1922, by declaring in writing to Illinois Central Railroad Company, a corporation by delivering said written declaration, directed to said corporation to M. J. Mulconnery, chief clerk of said corporation, he being in the business office of said corporation and having charge thereof, that I attached in its hands all debts due from it to said defendant. . , and all goods, moneys, effects, rights, credits, chattels, choses in action and evidences of debt, of, belonging to, the said defendant. . , or so much thereof as would be sufficient to satisfy the debt, interest and costs in this suit, and by summoning it in writing as garnishee, and I, at the same time, by said direction, further executed said writ by [fol. 29] summoning said corporation as garnishee, by declaring to it in writing, by delivering a summons of garnishment in writing directed to said corporation, to said M. J. Mulconnery, chief clerk thereof, that I summoned it to appear before the Circuit Court for the City of St. Louis, at the courthouse in said city, at the return

term of said writ, to wit, on the first Monday of February next, to answer such interrogatories as might be exhibited and propounded to it by the within named plaintiff.

The president or other chief officer of said corporation could not be found in the City of St. Louis at the time of service.

Chas. E. Mohrstadt, Sheriff of the City of St. Louis, By Joe Goldsmith, Deputy. Gar. & N. B. $1.50 due. St. Louis, Mo., 2-6-1922.

[fol. 30] CERTIFICATE OF CLERK OF CIRCUIT COURT

STATE OF MISSOURI,
City of St. Louis, ss:

I, Nat Goldstein, Clerk of the Circuit Court, City of St. Louis, within and for the city and state aforesaid certify the foregoing to be a full, true and complete copy of the petition filed June 13th, 1921, in the cause wherein American Fruit Growers, Inc., is plaintiff and the St. Louis, Brownsville & Mexico Railroad Company, a corporation, is defendant, being cause No. 14,065, Series "B," of the causes in this court, together with the affidavit for attachment filed with said petition, the alias writ of attachment, and the Sheriff's return thereon, as fully as the same remain on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at office, in the City of St. Louis, this 21st day of February, 1922.

Nat Goldstein, Clerk Circuit Court.

After consideration, this Court, on the 11th day of March, 1922, issued its preliminary rule in prohibition in usual and proper form, prohibiting respondent from proceeding further in said cause No. 46,156, until the further order of this Court.

To this rule respondent made return, which return (caption and signatures omitted) is as follows:

[fol. 31] IN THE SUPREME COURT OF MISSOURI

RETURN ON SUGGESTION OF PROHIBITION TO THE SUPREME COURT DIRECTED AGAINST WILSON A. TAYLOR, JUDGE OF THE CIRCUIT COURT, CITY OF ST. LOUIS, MISSOURI

Now comes Wilson A. Taylor, Judge of the Circuit Court of the City of St. Louis, Missouri, and making return to the writ of prohibition herein, shows unto the Court that, in the matter concerning which he has been cited to appear, he was proceeding in the proper exercise of his jurisdiction in such matters, conferred upon him by law, and that there is no reason in law why the rule heretofore made upon him to show cause should be made absolute.

The respondent further states that the petition filed by the relator does not state facts sufficient to constitute a cause of action in prohibition in that it shows on its face, first, that the original petition filed in the cause below was an ordinary suit setting out that the defendant negligently transported a shipment of cabbage so that it arrived at its destination spoiled, deteriorated and decayed, and that the plaintiff was damaged thereby.

Second. That there is nothing in the petition of the plaintiff below which sets out that this suit is brought under the Carmack Act.

Third. That there is nothing in the Carmack Act which prohibits the bringing of suits of attachment.

Fourth. That the Carmack Act expressly provides that nothing in the section of the act "shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

Wherefore, having fully answered herewith, respondent prays [fol. 32] that the temporary order of prohibition be dissolved and that respondent herein be ordered to further proceed with the said cause, and that this respondent be discharged hence with his costs.

Relator thereupon filed its motion for a judgment on the pleadings, which motion (omitting caption and signatures) is as follows:

IN THE SUPREME COURT OF MISSOURI

MOTION FOR JUDGMENT ON THE PLEADINGS

Comes now relator and states to the Court that in the return filed herein by respondent there is no statement controverting the allegations of fact set forth and pleaded in the application of relator for prohibition filed herein, and said return states no facts authorizing the Court to quash the preliminary rule in prohibition issued in said cause.

Wherefore, relator prays for judgment on the pleadings and that the preliminary rule issued herein may be made absolute.

[fol. 33] And thereafter, on the 2nd day of April, 1923, the following further proceedings were had and entered of record in said cause, to-wit:

IN THE SUPREME COURT OF MISSOURI, OCTOBER TERM, 1922

JUDGMENT

In Banc

[Title omitted]

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised

of and concerning the premises, doth consider and adjudge that the preliminary rule in prohibition heretofore issued herein be discharged, and that the writ of prohibition prayed for herein be denied, and that the said respondent recover against the said relator his costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said plaintiff is in the words and figures following to-wit:

[fol. 34] IN THE SUPREME COURT OF MISSOURI, OCTOBER TERM, 1922

En Banc

[Title omitted]

OPINION, BLAIR, J.

This is an original proceeding in this court, whereby, upon petition of relator, we issued our preliminary rule in prohibition against respondent as judge of division one of the circuit court of the city of St. Louis, commanding him to appear and show cause why he should not be prohibited from hearing or taking further cognizance of or action in a certain cause pending in division one of said circuit court, wherein American Fruit Growers, Inc. (hereinafter referred to as plaintiff) is plaintiff and relator in this case is defendant.

The return of respondent is in effect a demurrer to the petition, upon which our preliminary rule issued. It raises no issue of fact, but asks that the preliminary rule be discharged because the petition does not state facts sufficient to constitute a cause of action in prohibition. Relator filed its motion for judgment on the pleadings.

[fol. 35] The contention of relator is that the plaintiff in the case pending in the said circuit court is seeking to hold relator liable in damages as the initial carrier in certain interstate shipments under the Carmack amendment to the interstate commerce act for loss sustained by plaintiff on certain carload shipments made from points in the state of Texas to points outside said state over the lines of relator and connecting carriers. Relator has no line of railroad outside of Texas and has no office in Missouri and no agent in this State through whom personal service upon it can be obtained. Attachment was issued and the Illinois Central Railroad Company was summoned as garnishee.

Relator contends that the plaintiff under its petition is seeking to hold it liable for damages caused by the negligence of its connecting carriers; that plaintiff's right to proceed for such negligence is a right conferred by the Carmack amendment and is a Federal right and can only be enforced by means of remedies granted by the Federal law; that under the Federal rule such suits can only be maintained in the district wherein personal service can be had upon relator and that attachment cannot be maintained unless such personal service can also be obtained; that the same rule applies in the

state courts in cases brought under the Carmack amendment as obtains under the Federal rule.

On the other hand, respondent contends that the petition states a cause of action for damages against relator only upon its common law liability as a common carrier for its own negligence and does not predicate relator's liability upon its liability as the initial carrier under the Carmack amendment; that even if said petition does seek [fol. 36] so to hold relator, there is nothing in the amendment depriving state courts of the procedural right to attach the property of the carrier found within the jurisdiction of the state court, without regard to whether or not personal service can be had upon such carrier.

It therefore becomes necessary to examine the petition filed in the circuit court to determine the nature of the suit. Such petition is in three counts. The first count alleges that on April 30, 1920, a carload of bulk cabbage in good, sound, merchantable condition was consigned by one George A. Arts from La Feria, Texas, to Pittsburg, Pennsylvania, over the railroad line of relator and was purchased by the plaintiff and it became consignee thereof and that in violation of its common law duty as a common carrier relator so negligently and carelessly transported said carload of cabbage that it was spoiled, deteriorated and decayed so that it was useless and unmerchantable and a total loss upon its arrival at destination. Judgment is prayed for the market value of such cabbage.

The second count alleges that on April 20, 1920, a carload of bulk cabbage in good, sound, merchantable condition was consigned by George A. Arts over relator's railroad line from Mercedes, Texas, to Cleveland, Ohio, and was sold to plaintiff, who became consignee thereof, and, in violation of its common law duty as a common carrier and through relator's carelessness and negligence, said carload of cabbage arrived at destination in a yellow, deteriorated and decayed condition, so that a large part thereof was useless and unmerchantable, causing loss to plaintiff, for which it prays judgment. [fol. 37] The third count alleges that on January 21, 1921, Hodge and Howell at Harlington, Texas, consigned over relator's railroad a carload shipment of vegetables, consisting of carrots, beets, cabbage, lettuce and spinach in good, sound, merchantable condition to St. Louis, Missouri, and that plaintiff purchased said carload of vegetables and became consignee thereof; that in violation of relator's common law duty as a common carrier and through its carelessness and negligence said carload of vegetables arrived at destination in a spoiled, deteriorated and unmerchantable condition; and that plaintiff was forced to sell same at a loss, for which it prays judgment. The total damages sought to be recovered in the three counts is $1,962.88.

That portion of the amendment to the act to regulate commerce known as the Carmack amendment, which is involved here, is found in chapter 3591 of the U. S. Statutes at Large, Vol. 34, part 1, at page 595. It reads as follows:

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to

a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

[fol. 38] "That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay to the owners of such property as may be evidenced by any receipt, judgment or transcript thereof."

It is obvious that the foregoing provisions did not change the liability of any carrier for its own negligence in handling shipments over its own lines (Cincinnati & Tex. Pac. Ry. v. Rankin, 241 U. S., l. c. 326), but required the receiving or initial carrier to issue a bill of lading to destination, whether such shipment was wholly over its own lines or over its own lines and those of connecting carriers and enabled the shipper or holder of such bill of lading to look to such receiving carrier for recovery for loss, damages or injury to such shipment whether caused by such receiving carrier or any connecting carrier moving it enroute to destination. It simply makes the connecting carriers agents of the receiving carrier and makes it answerable for their negligence or acts causing loss, damage or injury, with the right in the receiving carrier to recover from the carrier at fault for any loss paid under such bill of lading. The evident purpose of such amendment was to do away with the necessity of the holder of a bill of lading making an investigation to determine which carrier was a fault, if other than the receiving carrier moved the shipment, and to leave the question of ultimate liability to be settled among themselves by the interested carriers.

[fol. 39] I

Does the petition state a cause of action under the Carmack amendment? We think it does. Relator has no railroad line outside the state of Texas and since it accepted the shipments for destinations outside the state of Texas, part of the haul was over lines of connecting carriers, although such fact is not specifically alleged in plaintiff's petition. The three counts of the petition in the case pending before respondent are substantially alike in respect to the character of the shipments. They were consigned over the railroad of relator from different stations in Texas to destinations outside of Texas. Take the first count as characteristic of all. It does not allege that relator issued a receipt or bill of lading to destination, but does allege that the shipper placed the shipment in the possession of relator and the

same was transported by it in a certain specified car with destination Pittsburgh, Pennsylvania. This is equivalent to an allegation that relator issued a through bill of lading to said destination. Relator received the shipment for transportation from a point within one state to a point within another state. In such case the carrier is required by the amendment to issue a through bill of lading and the presumption will be indulged that relator did what the law required it to do. Relator could not have limited its liability to loss, damage or injury occurring upon its own lines if it had attempted to contract to that effect when it undertook to transport the shipment over its own and connecting lines. (Atlantic Coast Line v. Riverside Mills, 219 U. S. 186, l. c. 205.)

[fol. 40] There is nothing in the allegation that "in violation of its common law duty as a common carrier the defendant transported the said shipment so negligently and carelessly" that said shipment arrived at destination spoiled, etc., which confines the plaintiff to proof of negligence of relator upon its own railroad line. There is no allegation that the negligence occurred while the shipment was on the line of relator. For anything appearing in the petition, the damage may have been caused while the shipment was on the line of a connecting carrier outside of Texas. Absent allegations to the contrary, the statement that loss or damage occurred to a shipment moving over two or more connecting railroads, the petition should be construed as charging that the loss or damage was caused by the delivering carrier, since the presumption is that such loss occurred on the lines of such delivering carrier, unless the contrary is alleged or proven. (Chicago & N. W. Ry. Co. v. C. C. Whitmack Produce Co., 42 Sup. Ct. Rep. 328; Charleston & Car. R. R. v. Varnville, 237 U. S. 597, l. c. 602.)

Nor is the situation changed by the fact that the petition alleges the loss was occasioned by carelessness and negligence and in violation of the common law duty of relator as a common carrier. Such negligence is clearly within the Carmack amendment. It does not change the common law duly of the carrier. Plaintiff need not have alleged that the loss was due to negligence. All that was necessary was to allege the delivery of the shipment to relator in good, sound condition and its delivery at destination in bad condition. The carrier is liable under the common law for all loss or damage not caused by the act of God or the public enemy, unless due to the inherent nature or quality of the shipment or the fault of the shipper [fol. 41] or owner. (10 C. J. 110.) With the foregoing exceptions the carrier is answerable in damages for loss incurred enroute, including its own negligence. The Carmack amendment makes the acts of connecting carriers the acts of the receiving carrier and their negligence its negligence so far as the shipper or owner is concerned. Our conclusion is that the petition sufficiently alleged facts which, if proven, would compel relator to respond in damages for loss occurring upon the lines of its connecting carriers, as well as upon its own line, and that the petition, absent definite allegation that the damage occurred on relator's line of railroad, states a cause of action under the Carmack amendment.

II

It must next be determined whether plaintiff can proceed against relator under such amendment in the courts of this State by attachment when personal service cannot be had upon it here. Relator contends for the application of the Federal rule, that attachment can only be maintained where the court has jurisdiction over the person of the defendant. (Big Vein Coal Co. v. Read, 229 U. S. 31; Laborde v. Ubarri, 214 U. S. 173; Ex parte Railway Company, 103 U. S. 794; Toland v. Sprague, 12 Peters, 300, l. c. 329.)

On the other hand, respondent contends that suit may be maintained by attachment in the state court under the Carmack amendment, regardless of jurisdiction of the court over the person of a defendant in the same manner as in an ordinary action; that the shipper had such right before the Carmack amendment under the interstate commerce law and the statutes of this State and that such rights were preserved to the shipper by the provision in the Carmack amend-
[fol. 42] ment "that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." Relator contends this provision preserves only the remedy or right of action under existing Federal law.

In Adams Express Company v. Croninger, 226 U. S. 503, Mr. Justice Lurton said:

"To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing Federal law at the time of his action, gives to it a more rational interpretation than one which would preserve rights and remedies under existing state laws, for the latter view would cause the proviso to destroy the act itself. One illustration would be right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier, for a loss or damage incurred upon the line of the former."

In Lysaght v. Lehigh Valley R. Co., 254 Fed. 351, Hand, Judge, said:

"The phrase 'existing law' means existing common law as understood in the federal courts, and excludes changes effected by state statutes."

In Southern Express Co. v. Byers, 240 U. S. 612, Mr. Justice McReynolds said:

"Manifestly the shipment was interstate commerce; and, under the settled doctrine established by our former opinions, rights and liabilities in connection therewith depend upon acts of Congress, the bill of lading and common law principles accepted and enforced by the Federal courts."

[fol. 43] See also Southern Ry. v. Prescot, 240 U. S. 632, l. c. 639; N. Y. & Norfolk R. R. v. Peninsula Exchange, 240 U. S. 34-38; Charleston & Car. R. R. v. Varnville Co., 237 U. S. 597-603.

The quotation above made from Mr. Justice Lurton in the Croninger case illustrates the character of rights and remedies preserved by the proviso. Under the pre-existing Federal law the holder of a bill of lading could sue a connecting carrier for loss, damage or injury caused by its own fault and this right was not taken away by the amendment. The same right could have been enforced in the state court. The right to proceed in the state courts was recognized by and was a part of the existing Federal law. It is unlikely Congress intended to deprive the state court of the power to enforce rights previously recognized and enforceable in both jurisdictions. If it had so intended, it is reasonable to assume it would have so declared in the amendment in unequivocal language. It would appear that its silence amounts to sanction of jurisdiction of state courts previously exercised. Referring to the illustration of Mr. Justice Lurton, the most reasonable construction to be given to the proviso is that it did not limit the holder of a bill of lading to suit against initial carrier if he was able to show a right to recover directly against any succeeding carrier upon whom fault for such loss could be fastened, especially as the connecting carrier may have been more conveniently proceeded against. If such right was previously enforceable in the state courts also, well and good. The proviso did not take it away.

[fol. 44] It is the expressed public policy of the Federal Government not only not to restrict the jurisdiction of the state courts in the enforcement of the provisions of the interstate commerce act, but on the contrary to encourage resort to the jurisdiction of the state courts. For example, such policy is shown by the amendment of January 10, 1914. Prior to that amendment suits and proceedings arising under any law regulating commerce were removable to the Federal courts without regard to the amount involved. (36 Stats, at Large, pp. 1901 and 1902, Sec. 24, Par. 8th.) The amendment of January 10, 1914, limited such removal to cases where the amount involved exceeds the sum of $3,000.

Again it is provided in the Federal employers' liability act (4 U. S. Compiled Statutes 1913, Sec. 8662) not only that the state courts have concurrent jurisdiction with the Federal courts in enforcing the provisions of the act, but that when an action is brought thereunder in the state courts of competent jurisdiction, such case is not removable to the Federal courts.

Relator insists that because Congress has not given the Federal courts jurisdiction by attachment, except in districts where the defendant may be personally served, the Carmack amendment gives the holder of a bill of lading a right to proceed in the state court only where personal service may be had upon the defendant. Congress has clearly recognized the validity of attachments in state courts in removal cases when it provided (34 Stats. at Large, p. 1098, Sec. 36, Chap. 231) that "When any suit shall be removed from a state court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the [fol. 45] state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner

as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced." The section quoted from makes no exceptions. If Congress did not intend to recognize the provisions of state laws authorizing attachment of the property of the defendant found within its jurisdiction, regardless of summons upon the defendant, it would have provided that, upon removal to the Federal court of cases where the defendant could not be personally served, the attachment should be dissolved. The result is that the Federal courts have jurisdiction to try cases upon removal from the state courts where goods are attached and defendant has not been personally served when the same court does not have original jurisdiction to do so. There is nothing in the Carmack amendment indicating a different policy in the enforcement of its provisions. It should be so construed only when a construction denying complete state jurisdiction clearly appears from the language used.

The precise question appears to be new so far as either the Federal or State appellate courts are concerned. Two cases are cited by relator bearing squarely upon the question. Both cases were decided by trial courts. There is before us an unofficial copy of an opinion written by United States District Judge Page Morris in the case of Pratt v. D. & R. G. W. R. Co. and C. St. P. M. & O. R. Co., et al., Garnishees (said by counsel for relator to be reported in 284 Fed. 1007). The above opinion is based upon an opinion written by Judge Crump, Presiding Judge in the Law and Equity Court at Richmond, Virginia, in a case entitled, Neale v. Illiois Central, de-[fol. 46] cided December 28, 1921, and so far as we are aware not anywhere officially reported. The facts in both cases are quite similar to those in the case before us and our concurrence in the conclusions therein reached would dispose of this case adversely to the jurisdiction of the respondent. The cases are in no wise controlling upon us and are only persuasive authority in so far as we conclude they are well reasoned. Since Judge Morris rested his conclusion upon the reasoning of Judge Crump, the opinion of the latter is the one to be chiefly considered. The reasons controlling the conclusion reached by Judge Crump appear in the following quotation from his opinion as quoted by Judge Morris:

" 'It seems to be that those prominent features of the federal law show plainly that a proceeding in foreign attachment under the statutes of Virginia, cannot give the right to the court to pass upon the liability of the initial carrier, unless it is brought before the court by proper process or voluntarily appears. The principal defendant in such a proceeding would be deprived of the right to rebut the presumption against it, although the loss or damage occurred on the line of a connecting carrier, and the ascertainment of the amount of the plaintiff's claim, as a preliminary to subjecting the foreign defendant's property to its payment, would not be a judgment upon which the initial carrier could recover against the connecting carrier. It is now well settled that the cause of action arising under the Interstate Commerce Act may be enforced by the appropriate remedy in a

state court, but it would be denying to the initial and the connecting [fol. 47] carrier, ultimately liable, due process of law, for the court to pass upon their rights in the absence of the initial carrier, upon whom the statute places the burden of making defense for all the carriers concerned."

The heart of the argument is that "it would be denying to the inital and the connecting carrier, ultimately liable, due process of law, for the court to pass upon their rights in the absence of the initial carrier, upon whom the statute places the burden of making defense for all the carriers concerned."

Numerous illustrations could be given where the same reasons might be urged as to the right of a plaintiff to proceed against a defendant, not personally served, where no possible doubt can exist about such plaintiff's right so to proceed. For example, A, residing in Missouri, holds a note endorsed to him by B, a resident of Texas, who received the note from C, the original payee. A, having been defeated in a suit against D, the purported maker of the note, on the ground that the note was a forgery, finds property belonging to B in Missouri, files suit against him here and attaches such property. Would any one contend that B is entitled to personal service and a personal judgment against him because he in turn must recoup his loss from C, the purported payee?

Again, A is in B's employ in Texas and is injured in that state by B's negligence. C has written an employer's liability policy indemnifying B against loss by reason of any judgment obtained against hip by his employees. After the injury C disclaims liability on the policy. A moves to Missouri and, there finding property belonging to B, files suit for damages and attaches such prop- [fol. 48] erty. Must the suit abate because B was not personally served and must look to a suit on the policy against C to recoup his loss?

Under both illustrations the plaintiff would be entitled to maintain the suit in this State and attach any property of the defendant found therein, regardless of personal service. Yet such seems to be the most decisive consideration in Judge Crump's reasoning. He does not base his ruling upon any language in the Carmack amendment which can be fairly construed as denying the right of attachment in the state court against the unserved non-resident initial carrier. He bases it upon the creation of a new liability under the act requiring the initial carrier to respond for loss or damage caused by a succeeding carrier and giving the initial carrier the right to recover against the carrier at fault. Yet, the liability thus created by the act is not essentially different, except in the manner of its creation, from the liability arising under the illustrations we have used. One is created by an act of Congress, the other by contract out of which such liability grows. The substantive rights of the initial carrier are not violated to any greater extent than are those of any defendant whose property is attached under comparable circumstances. Attachment affects the remedy. It is procedural in char-

acter, a means for enforcement of a right. The rights or liabilities growing out of a contract or inherent in it or created by a statute are not enlarged or diminished by the suing out of an attachment. As said by Mr. Justice Matthews in Pritchard v. Norton, 106 U. S., l. c. 129;

[fol. 49] "Whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation and affects the rights of the parties, as growing out of the contract itself, or inhering in it or attaching to it, is governed by the law of the contract."

We find ourselves unable to yield our concurrence in the conclusion reached by the learned Virginia judge or the learned United States district judge who adopted his opinion. Congress has encouraged the use of the state jurisdiction in cases arising under the interstate commerce act. It even gives effect to attachments in cases after removal, where such attachment could not have been maintained originally in the Federal courts. Our own statutes authorize the very character of proceeding we are here asked to prohibit. There is no language in the Carmack amendment which specifically denies the state courts the right to proceed as respondent has proceeded. It seems a strained and unnatural construction to put upon the amendment as it is written to hold that it denies the plaintiff the benefit of attachment without personal service upon the defendant. In the absence of an authoritative expression from the Federal appellate courts, we will not adopt a construction which tends to impair the efficiency of procedure authorized by our own statutes and designed to facilitate enforcement of lawful demands of the citizens of this State against residents of other states who have property here. [fol. 50] We hold that respondent is acting within his appropriate jurisdiction and order the preliminary rule discharged.

All concur, except Graves, J., who dissents in separate opinion.

David E. Blair. J.

And on the same day, to-wit, the 2nd day of April, 1923, Graves, J., filed his dissenting opinion herein, which said dissenting opinion is in the words and figures following, to-wit:

[fol. 51] IN THE SUPREME COURT OF MISSOURI, OCTOBER TERM, 1922

En Banc

[Title omitted]

DISSENTING OPINION, GRAVES J.

I do not concur in the views of my learned brother writing the majority opinion in ths case. I agree to the doctrine announced by

the Virginia Court, and the Federal Court, cited and discussed in the opinion. These cases rule, and they are the only cases upon the exact point involved here, that jurisdiction cannot be acquired as to a defendant not residing within the territorial jurisdiction of the court, by a foreign attachment, in cases arising under what is familiarly known as the Carmack Amendment. Applying the doctrine of these cases, our preliminary rule in prohibition should be made absolute.

I

This is purely an action created by Federal law. This law for the first time created an absolute liability against the initial carrier. The petition in this case does not aver where the damage occurred, but it does aver that the freight was delivered in good condition to the initial carrier, and was damaged when delivered by the connecting carrier. There is no allegation that the damages occurred on relator's line. In this situation the presumption is that the property remained in good condition until the last moment when it could be harmed. Railway Co. v. Varnville Co. 237 U. S. 602. The action is clearly one based upon the Carmack Amendment, and is therefore a right of action arising under the laws of the United States. Wells Fargo & Co. v. Cuneo, 241 Fed. l. c. 727; Alabama [fol. 52] Great Southern Ry. Co. vs. American Cotton Oil Co. 229 Fed. 11.

This statute not only gives the shipper an absolute right of action against the initial carrier, but it gives the initial carrier a right of action over against the particular carrier which permitted the damages to be done. If a Federal Statute creates a right of action and suit is brought to enforce such right, such suit arises under the law creating the right. McCoon vs. Ry. Co. 204 Fed. 198; Alabama Great Southern Ry. Co. vs. American Cotton Oil Co. 229 Fed. 11.

II

Like actions under the Federal Employers' Liability Act, suits under Carmack's Amendment can be brought in state courts, and if for less than $3,000.00 can not be removed therefrom to a Federal Court. Removal is prohibited by statute. U. S. compiled Statutes, 1918, sec. 1010. This, however, does not change the fact that the suit is one under a Federal law. Prior to the statute, (Carmack's Amendment) it is true, that there was a right of action against a railroad for damages to goods, which were transported by the railroad. But the peculiar right of action given by this statute did not exist. We mean the absolute right to sue for and recover against the initial carrier, the damages sustained, although the damages did not result from any personal act of the initial carrier. Under the Federal rule jurisdiction in Federal Courts could not be secured by a mere attachment proceeding. The defendant had to be within the territorial jurisdiction of the court, and personal service upon the defendant is required. There must be jurisdicton over the person of the defendant before attachment can be maintained under

the Federal rule. Big Vein Coal Co. vs. Read, 229 U. S. 31; Laborde vs. Ubarri, 214 U. S. 173; Ex Parte Railway Co., 103 U. S. 796.

Had the suit involved here been brought in the Federal Court in St. Louis, rather than the state court, as it was brought, it is clear that such Federal Court could acquire no jurisdiction under the cases, supra. Has the state court in actions based upon a Federal law, more power than a Federal Court in the same district? [fol. 53] This is the interesting query.

III

We are not inclined to think that we should rule (as the majority of opinion does rule) that the state court can obtain jurisdiction in a case of the character involved here, when the Federal Court in the same city could not acquire such jurisdiction. The majority opinion says that the action is one stated under the Carmack Amendment, as we have stated above, but says that the state court could acquire jurisdiction per force of the proviso contained in the Carmack Amendment, which reads: "Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." It is reasoned that under previous or pre-existing Federal law, suit could be maintained against the connecting carrier for damages occasioned by it, and the amendment did not take away this right. We need not discuss this ruling by the majority, because no such case is involved here. The suit here is against an initial carrier, and for damages which under the pleadings, and inferences to be drawn from the language, were occasioned by the last connecting carrier. This right to sue the initial carrier for the damages which were occasioned by the connecting carrier was first given by the Carmack Amendment. Upon this peculiar right there was no pre-existing law, and this is the right sought to be inforced in the case involved in our proceeding.

The foregoing may be somewhat adrift from what we think is the vital question here. Can a state court acquire jurisdiction in method not tolerated by the Federal Courts? It has been said that the Carmack Amendment not only creates a right, but furnished a remedy. Ry. Co. vs. Wallace, 223 U. S. l. c. 491. But be this as it may we must answer the question, does the statute allow the acquisition of jurisdiction in one way by a state court, which way can not be used by a Federal Court. The proviso to the statute speaks of rights preserved, but it has been ruled that "existing laws" as used in the [fol. 54] statute "means existing common law as understood in the Federal Courts, and excludes changes effected by state statutes": Lysaght vs. Ry. Co. 254 Fed. l. c. 353. Under no existing law could Federal Courts acquire jurisdiction of the cause by mere attachment, without personal service. If this be the meaning of "existing law" in this statute, then the right to obtain jurisdiction of the cause and of defendant in the method used was not a right given by "existing law." The "existing law," denied this method of acquiring jurisdiction. The cases as to attachment without personal service, we have cited, supra. One other view, and we are through. Of that next.

IV

The right to sue out an attachment is a substantive right, and is not mere procedure. Especially is this true when attachment is used to obtain jurisdiction. In Butler v. Young, 1 Flippin l. c. 279 it is said:

"Care and caution will be used, that substantive rights given by the State laws shall not be confounded with what is mere practice in the State courts. In this connection I may mention, among other matters, the right to bring an absent or non-resident defendant into court by publication, or the right to a second trial, which are not matters of mere practice, but are substantial rights conferred by the statute of the State, and, in my opinion, were not contemplated by Congress by the law in question to be given to parties in this court."

The foregoing was quoted with approval in Harland vs. United Lines Tel. Co. 40 Fed. l. c. 317. The force of it is that the acquisition of jurisdiction is substantive law, and not mere procedure. If it be substantive law, then in cases arising under a Federal Law, the rule of the Federal Courts must govern. Wherever substantive rights are involved in such cases the Federal rule must prevail. If the acquisition of jurisdiction is not a substantive right, it would be hard to find one. It has been ruled that "the question of burden of proof is a matter of substance and not subject to control by the laws of the several states," Ry. Co. vs. Harris, 247 U. S. 367; Baker, et al. [fol. 55] vs. Schaff, 211 S. W. l. c. 104 and the cases therein cited. So too the Federal rule as to what constitutes assumption of risk in personal injury cases is substantive law, to which the state courts must bow. Pryor vs. Williams, 254 U. S. 43, and cases therein cited.

So if the acquisition of jurisdiction by attachment is substantive law, and in view of the rulings, supra, we think it is, then the statutes or rules of the state do not control, but the Federal rule must be applied by the state court. If jurisdiction by foreign attachment is denied by Federal rule, then it must be denied by the state trying a case arising under a Federal law, notwithstanding the state rule or state statute may be different. By the Federal rule an attachment is merely an incident to the suit and personal service must be obtained. If the state court undertakes to try a case arising under a Federal law, it must follow the Federal rule in matters of substantive law. The state court is attempting to proceed without jurisdiction and our preliminary rule should be made absolute.

W. W. Graves, Judge.

[fol. 56] And thereafter, on the 10th day of April, 1923, the said relator filed its motion for a rehearing in said cause, and suggestions in support thereof, which said motion and suggestions are in the words and figures following, to wit:

IN THE SUPREME COURT OF MISSOURI, OCTOBER TERM, 1922

En Banc

[Title omitted]

RELATOR'S MOTION FOR REHEARING

Comes now relator, and within the time required by the rules of this Court, files this motion for rehearing in the above-entitled cause for the reason that questions decisive of the case and duly submitted by counsel have been overlooked by the Court, as hereinafter more particularly stated, to wit:

[fol. 57]

1

That Congress, through the Interstate Commerce Act, and particularly the Carmack Amendment thereto, has assumed jurisdiction over the subject matter relating to loss and damage to interstate freight, and has thereby, in so far as substantive matters are concerned, superseded the state statutes and the state common law which in any manner attempt to prescribe, regulate or affect the liability for damage to interstate freight, either with respect to actions against the initial carrier or to actions against the carrier on whose line the damage actually occurred; that while the Carmack Amendment does specifically preserve to the shipper "any remedy or right of action which he has under existing law," yet under the authoritative rulings of the Supreme Court of the United States, this provision preserves to the shipper only the statutory and common-law rights existing under the federal law, and does not preserve to him rights that he previously had under the common law and statutes of the states; that this plaintiff, suing in a state court, upon a cause of action based upon the federal statute, is bound by the substantive limitations, and the substantive rights that would be afforded the defendant had the suit been filed in the federal courts, and that the attachment of a nonresident defendant's property without personal service upon him in a suit based upon a federal statute or the common law of the federal courts, and under circumstances which would not be permissible were the suit filed in a federal jurisdiction, affects and prejudices the substantive rights of the defendant and deprives him [fol. 58] of his property without due process of law, and abridges the privileges and the munities of a citizen of the United States in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2

That the issue in this case, according to the majority opinion, is whether the shipper had a right prior to the enactment of the Carmack Amendment, under the Interstate Commerce Law and the statutes of this state, to sue the initial carrier for damage which is presumed to have occurred upon the line of its connections, and whether such a right, if it existed, was preserved to the shipper by the provision of the Carmack Amendment to the effect "that nothing in this section shall deprive any holder of such receipt or bill of lading

of any remedy or right of action which he has under existing law;" that while the Court has not directly indicated its ruling upon this specific issue, its ultimate conclusion and Judge Graves' interpretation of the majority opinion in his dissenting opinion, indicate that this Court intended to hold that prior to the Carmack Amendment "the Interstate Commerce law or the statutes of this state" authorized suit against the initial carrier for damage occurring upon the line of its connections, and that such rights, if any, both federal and state, were preserved to the shipper by the specific provisions of the Carmack Amendment; that there was, as a matter of fact, no right, prior to the enactment of the Carmack Amendment, under the federal statutes or the federal common law, authorizing a shipper to sue the [fol. 59] initial carrier for the negligence of its connections, much less to begin such a suit by attachment, and that if this Court intends to permit plaintiff to predicate his cause of action upon the statutory or substantive common law of this state, or intends to permit him to piece out his federal right of action by resorting to the statutes or common law of the state with respect to matters other than mere procedure, then this opinion is in direct conflict with the authoritative decisions of the federal courts in the following cases, to wit: Southern Express Co. v. Byers, 240 U. S. 612; Adams Express Co. v. Croninger, 226 U. S. 503, and Lysaght v. Lehigh Valley R. Co., 254 Fed. 351.

3

That the decision of this Court is in violation of Paragraph 3 of Section 8 of Article I of the Constitution of the United States delegating to Congress the power to regulate commerce between the several states, in this, to wit: That Congress, through the Carmack Amendment, has taken jurisdiction over all matters relating to loss and damage of interstate freight, thereby superseding all state laws and regulations with respect thereto, and that this Court, in permitting plaintiff to resort to state statutes, hereby adding to and supplementing the substantive rights afforded by the federal statute, has directly contravened the rule announced in the following authoritative decisions, to wit: Ry. Co. v. Varnville, 237 U. S. 604; Ry. Co. v. Winfield, 244 U. S. 153, and Prigg v. Pennsylvania, 16 Pet. 617.

[fol. 60]

4

That this Court, in terming and treating as a mere matter of procedure the attachment of the property of a nonresident defendant, without personal service upon him in a suit based upon the Carmack Amendment to the Interstate Commerce Act, is ignoring and directly contravening the principles announced in the following authoritative decisions, to wit: Pryor v. Williams, 254 U. S. 43; Ry. Co. v. White, 238 U. S. 511; Ry. Co. v. Gray, 241 U. S. 338; Ry. Co. v. Harris, 247 U. S. 371; Slater v. Ry. Co., 194 U. S. 126; Harland v. Telephone Co., 40 Fed. 311, and Pratt v. D. & R. G. W. R. R. Co., 284 Fed. 1007.

Jas. F. Green, H. H. Larimore, Thos. T. Railey, Attorneys for Relator.

[fol. 61] IN THE SUPREME COURT OF MISSOURI

SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING

The correct determination of the question at issue involves several underlying issues and principles. First, has not Congress, through the Interstate Commerce Act, and particularly the Carmack Amendment thereto, assumed jurisdiction over all claims for loss and damage to interstate freight, so that the common law and the statutes of the states are no longer applicable? Second, does the specific reservation in the Carmack Amendment to the effect that nothing in said section shall deprive a shipper of "any remedy or right of action which he has under existing law" preserve to him merely the rights that he had under the federal common law, or does it preserve to him rights that he previously had under the common law and statutes of the states? Third, where a plaintiff sues in a state court upon a transitory cause of action based upon a federal statute or upon the common law of the Federal Courts, is he not bound by all of the substantive rights that the defendant would be entitled to in the Federal Courts? Fourth, does not the bringing in of a nonresident defendant by attachment affect the substantive rights of the defendant, or is it a mere matter of practice and procedure which does not add to the substantive rights of the plaintiff, nor deprive defendant of substantial rights accorded him by the federal law.

We have, with some disappointment, failed to find any of these important underlying principles and issues either discussed or directly [fol. 62] answered in the majority opinion in this case. Lest, in our previous briefs, we may not have made our views clear to all of the Court, we will tersely restate them.

Congress, through the interstate Commerce Act, and particularly through the Carmack Amendment, assumed jurisdiction over all loss or damage to interstate freight. Any previously-existing rights with respect to interstate shipments based on state statutes or upon the state common law completely vanished upon the enactment of said statute. The act itself preserved to the shipper his previously-existing rights under the federal common law, but not his previously-existing rights under the state common law. There is, of course, a marked distinction in many respects between the federal common law and the state common law, respecting, for example, the burden of proof, the assumption of risk, etc. A plaintiff in a state court has a right to predicate his cause of action upon the federal statute or upon the federal common law, but in doing so, he must take the federal law as he finds it. He can use the machinery of the state—the state courts with their local rules of pleading and procedure—to enforce his federal rights, but he cannot resort to the statutes of the state or the common law of the state to obtain additional substantive rights or to deprive defendant of substantial rights which he would be entitled to were the suit prosecuted in the federal courts. He can enforce the federal law in the state courts just as he can enforce in one state a transitory action based upon a statute of another state, but he must take federal rights of action as he finds them, with the

[fol. 63] disadvantages as well as the advantages that would attach in the Federal Courts. It follows, therefore, that if the bringing in of a nonresident defendant by attachment involves a substantial or substantive right, as distinguished from mere procedure, defendant's property is being taken without due process of law.

With this brief statement of our contention in mind, we respectfully request that the Court carefully analyze the second proposition discussed in the majority opinion. Judge Blair, speaking for the Court, says:

"Respondent contends * * * that the shipper had such right before the Carmack Amendment under the Interstate Commerce law and the statutes of this state, and that such rights were preserved to the shipper by the provision in the Carmack Amendment 'that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.' Relator contends this provision preserves only the remedy or right of action under existing Federal law."

The issue thus stated, we gather from the majority opinion, is the underlying point in dispute, and yet we have read and reread the majority opinion without being able to determine whether the Court has passed upon this question, much less how it has decided it. Does this Court intend to hold that the Carmack Amendment preserves to the shipper of interstate freight substantive rights that previously existed under either the state common law or the state statutes? To so hold would be in direct conflict with the three leading cases from which the Court quotes.

[fol: 64] We assume from the fact that the writ is dismissed that Judge Blair intends to so hold that the Carmack Amendment does not deprive shippers of substantial rights based upon the common law of the state, but we very much doubt that the other learned Judges who concurred in this opinion realize that they were agreeing to such a conclusion, if such is the case. We respectfully urge that this doubt should be cleared up, and that if it is the intention of this Court to decide this issue in what we deem direct conflict with the Federal decisions referred to, then we respectfully insist that this ruling should be in positive and unequivocal language. On the other hand, if it was not the intention to hold that the Carmack Amendment still preserves to the shipper substantial rights based upon the statutes and common law of the states, we are at a loss to understand on what ground the Court has found for respondent.

Furthermore, as emphasized by Judge Graves in his dissenting opinion, what such existing right did the shippers, at the time of the passage of the Carmack Amendment, have? A cause of action predicated upon the Carmack Amendment—and the majority opinion concedes that this is a suit based on the Carmack Amendment—is a statutory cause of action which did not exist at common law and which consequently did not exist at the time of the passage of the Carmack Amendment. To quote from the dissenting opinion:

"The suit here is against an initial carrier, and for damages which under the pleadings, and inferences to be drawn from the language, were occasioned by the last connecting carrier. This right to sue the [fol. 65] initial carrier for the damages which were occasioned by the connecting carrier was first given by the Carmack Amendment. Upon this peculiar right there was no pre-existing law, and this is the right sought to be enforced in the case involved in our proceeding."

The majority opinion, after stating the aforesaid issue and citing cases on which this respondent is relying, without drawing its conclusions therefrom, then proceeds:

"Under the pre-existing federal law the holder of a bill of lading could sue a connecting carrier for loss, damage or injury caused by its own fault, and this right was not taken away by the amendment. The same right could have been enforced in the state court. The right to proceed in the state courts was recognized by and was a part of the existing federal law. It is unlikely Congress intended to deprive the state court of the power to enforce rights previously recognized and enforceable in both jurisdictions. If it had so intended, it is reasonable to assume it would have so declared in the amendment in unequivocal language. It would appear that its silence amounts to sanction of jurisdiction of state courts previously exercised. Referring to the illustration of Mr. Justice Lurton the most reasonable construction to be given to the proviso is that it did not limit the holder of a bill of lading to suit against initial carrier if he was able to show a right to recover directly against any succeeding carrier upon whom fault for such loss could be fastened, especially as the connecting carrier may have been more conveniently proceeded against. If such right was previously enforceable in the state [fol. 66] courts also, well and good. The proviso did not take it away.

"It is the expressed public policy of the federal government not only not to restrict the jurisdiction of the state courts in the enforcement of the provisions of the interstate commerce act, but on the contrary to encourage resort to the jurisdiction of the state courts. For example, such policy is shown by the amendment of January 10, 1914. Prior to that amendment suits and proceedings arising under any law regulating commerce were removable to the federal courts without regard to the amount involved 36 Stats. at Large, pp. 1901 and 1902, Sec. 24, par. 8th). The amendment of January 10, 1914, limited such removal to cases where the amount involved exceeds the sum of *of* $3,000.

"Again, it is provided in the Federal Employers Liability Act (4 U. S. Compiled Statutes 1913, Sec. 8662) not only that the state courts have concurrent jurisdiction with the federal courts in enforcing the provisions of the act, but that when an action is brought thereunder in the state courts of competent jurisdiction, such case is not removable to the federal courts."

This Court argues, supra, that the right to proceed in the state court was recognized by the federal law; it argues that Congress did

not intend to deprive the state courts of their power to enforce such rights; it argues that had Congress so intended to deprive the state courts of jurisdiction, it would have expressly so provided; it argues that "it is the expressed public policy of the federal government not only to restrict the jurisdiction of the state courts in the enforcement of the provisions of the Interstate Commerce Act but, on the [fol. 67] contrary, to encourage resort to the jurisdiction of the state courts"; and it cites as an example the provision of the Employers' Liability Act specifically authorizing suits thereon in the state courts.

We fully concur in all that the Court has to say, but what bearing does it have on this case? We are not disputing the right of this shipper to sue in the state courts on a federal transitory right of action, but what we are insisting is that if he elects to sue in the state court upon a federal right of action, he must take that right of action subject to all of the restrictions with respect to substantive matters that would be binding upon him if his suit were filed in the federal courts. For example, if a shipper sues in the courts of Missouri upon a cause of action created by the statutes of Kansas, he acquires that right subject to the limitations and interpretations that the Supreme Court of Kansas has placed upon it. If the Supreme Court of Kansas has held that it must be enforced in some particular manner, he cannot resort to the Missouri decision and to the Missouri statutes in support of his right to enforce it in this state in some other manner, if to do so would prejudice substantial rights that the defendant would have were the suit filed in the State of Kansas. The same rule is applicable where a shipper sues in the state courts on a federal right of action—he acquires that right of action subject to the restrictions with which it is surrounded by the policy and rulings of the federal courts. He cannot piece out the federal right of action by relying upon the public policy and the [fol. 68] common-law decisions of the forum. At no time have we questioned the right of this plaintiff to sue in the state courts, and yet the majority opinion treats this as one of the principal issues in the case.

The majority opinion proceeds:

"Relator insists that because Congress has not given the federal courts jurisdiction by attachment, except in districts where the defendant may be personally served, the Carmack Amendment gives the holder of a bill of lading a right to proceed in the state court only where personal service may be had upon the defendant. Congress has clearly recognized the validity of attachments in state courts in removal cases when it provided (34 Stats. at Large, p. 1098, Sec. 36, Chap. 231) that 'When any suit shall be removed from a state court to a District Court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the Court in which said suit was commenced.'

The section quoted from makes no exceptions. If Congress did not intend to recognize the provisions of state laws authorizing attachment of the property of the defendant found within its jurisdiction, regardless of summons upon the defendant, it would have provided that, upon removal to the federal court of cases where the defendant could not be personally served, the attachment should be dissolved. The result is that the federal courts have jurisdiction to try cases upon removal from the state courts where goods are [fol. 69] attached and defendant has not been personally served when the case court does not have original jurisdiction to do so. There is nothing in the Carmack Amendment indicating a different policy in the enforcement of its provisions. It should be so construed only when a construction denying complete state jurisdiction clearly appears from the language used."

We fail to appreciate the Court's analogy between the removal statute referred to and the point at issue in this case. The removal statute simply provides that where there has been valid and lawful service in the state court, even though begun in a manner which would not be recognized in an initial proceeding in the federal court, it shall be good upon removal to the federal court. Instead of this rule being against us, it is, as a matter of fact, directly in line with what we are contending. Service by attachment is more than a mere matter of procedure—it is a substantial or substantive right. It was not the intention of Congress that removal to the federal court should deprive plaintiff of such substantial rights afforded him by the courts in which his suit was properly brought. If his service by attachment was valid in the state court, it was the intention of Congress that this substantial right be protected upon removal to the federal court. It was not the intention of Congress, however, to authorize suit in the state court on a federal right of action to be begun by the attachment of a nonresident defendant's property, while at the same time prohibiting such right in the federal courts. All that the statute in question did was to protect the [fol. 70] substantive rights that the plaintiff was lawfully entitled to in the state courts prior to the removal, and Congress has not, either directly or impliedly, undertaken to extend the rights of such plaintiff with respect to any suit which could not otherwise be begun by the attachment of the property of an absent defendant.

This Court might just as plausibly argue that because Congress has seen fit to authorize suits in the state courts based upon the Federal Employers' Liability Act, that it has thereby impliedly sanctioned the application of the common law and public policy of the state with respect thereto, and yet the Supreme Court of the United States, discussing this question in such cases as Ry. Co. v. White, 238 U. S. 511, and Pryor v. Williams, 254 U. S. 43, has refused to permit the state courts to apply their rules with respect to burden of proof and assumption of risk, on the ground that substantive rights are involved.

It seems to us unreasonable that this Court should ignore well-established rules and precedents on the underlying issues in this case, and attempt to reason out from entirely irrelevant legislation

the presumed intention attributed to Congress. Nor are the reasons given for this presumed intention of the lawmakers well taken, for, as pointed out by Judge Graves in his dissenting opinion, "Has the state court in actions based upon the federal law, more power than the federal court in the same district?" In other words, was it the intention of Congress to permit a plaintiff to avail himself in the state court, in a suit based on the federal statute, of additional substantive rights not afforded him in a suit on the same statute in the [fol. 71] federal courts? To attribute such an intention to Congress would, in our opinion, be to consider Congress extremely inconsistent, to say the least. As a matter of fact, however, the statute referred to has nothing whatever to do with this case, either directly or by analogy.

The remaining portion of the majority opinion is devoted to a discussion of the decision of Judge Page Morris in Pratt v. D. & R. G. W. R. R., 284 Fed. 1007, and to the unreported opinion of Judge Crump, presiding Judge in the Law and Equity Court at Richmond, Virginia, in Neale v. Illinois Central. This Court rather disparagingly refers to Judge Morris' decision as "an unofficial copy of an opinion," notwithstanding the fact that it then proceeds to give reference to the volume and page of the Federal Reporter where the case is reported, and as a matter of fact, the case was printed in the Federal Advance Sheets of February 15th, and was in the bound volumes of the Federal Reporter at the time this opinion was handed down. We assume that Judge Crump hardly anticipated that his unreported opinion would be circulated broadcast, otherwise he would doubtless have expressed in detail the reasons leading up to his conclusions. As it stands, his opinion is largely in the nature of conclusions.

This Court, in characterizing the opinion of Judge Crump, states:

"The heart of the argument is that 'it would be denying to the initial and the connecting carrier, ultimately liable, due process of law, for the Court to pass upon their rights in the absence of the initial carriers, upon whom the statute places the burden of making defense for all the carriers concerned.' "

[fol. 72] We think that Judge Crump's opinion goes further than this, and that his conclusions are well taken. However, an examination of our briefs will disclose that we merely quoted the decision of Judge Crump, and did not present the case on the reasoning advanced by him.

The same was true in the presentation of the Pratt case before Judge Morris. The Pratt case was presented on the same briefs that have been filed in the case at bar, and the opinion of Judge Crump was quoted, but not commented upon. In other words, we argued the Pratt case, and we have argued this case, upon the theory outlined in the first few paragraphs of these "suggestions in support of the motion for rehearing." While Judge Morris, in the Pratt case, did quote and adhere to the views expressed by Judge Crump, yet this Court has apparently overlooked the fact that Judge Morris likewise considered the additional arguments which we advanced

before him and have urged before this Court, and in his opinion specifically held that:

"I believe that the right to bring an absent or nonresident defendant into court by publication or personal service outside the state affects the substantive rights of the defendant (see Harland v. Telephone Co. (C. C.) 40 Fed. 311, 6 L. R. A. 252)."

It will be noted from this Court's statement of the gist of Judge Crump's opinion that it is entirely distinct from the principal grounds we have presented in support of relator's application. Judge Crump, according to this Court, held that such an attachment was void because it would be denying to the initial carrier and the [fol. 73]connecting carrier, ultimately liable, due process of law, for the Court to pass upon their rights in the absence of the initial carrier. There is nothing in our briefs in support of this argument other than the quotation of Judge Crump's opinion, but, on the contrary, we have stood upon the argument that the bringing in of a nonresident defendant by foreign attachment involves a substantive right not accorded the plaintiff by the common law of the federal courts, and that under the circumstances a plaintiff suing upon the federal statute in the state courts cannot avail himself of such additional substantive rights accorded by the common law of the states or by the state statutes, to the prejudice of the defendant. As stated, we think the conclusions reached by Judge Crump are correct, but even if they are not, the lengthy discussion of his opinion has no bearing upon the principal theory on which this case has been presented, briefed and argued.

This Court, in the concluding paragraph of the majority opinion, reiterates its views as to Judge Crump's decision, again refers to the federal removal statute, and to the fact that Congress has encouraged the use of the state courts, and in conclusion states that the Court will not adopt a construction which tends to impair "the efficiency of procedure authorized by our own statutes."

The primary point at issue has been and now is whether the bringing in of a nonresident defendant under such circumstances is a mere matter of procedure or whether it is the violation of a substantial or substantive right, and this Court, instead of passing upon [fol. 74] this question and considering the decisions cited by us which are directly in point, and the decisions of the Supreme Court of the United States applicable by analogy, has passed this issue without comment other than to refer to it in this concluding sentence as "procedure." If the bringing in of a nonresident defendant by attachment under such circumstances is a matter of procedure, we have frankly admitted and now admit that we have nothing further to argue. The issue is of such importance as to warrant a detailed expression of the views of this Court.

Concluding our suggestions in support of this motion for rehearing, we again respectfully insist that not a one of the several primary issues involved in this case has been discussed in the majority opinion of the Court. To reiterate, these issues are, first, whether Congress, through the Interstate Commerce Act, and particularly the Carmack

Amendment thereto, has assumed jurisdiction over the subject matter relating to loss and damage to interstate freight, so as to supersede all statutes and common law of the states otherwise applicable; second, whether the specific language of the Carmack Amendment reserving to the shipper "any remedy or right of action which he has under existing law" preserves to him the rights and remedies previously existing under the statutes and common law of the state; third, whether a plaintiff suing in the state court upon a transitory action afforded by a federal statute must take his right of action subject to all substantive rights that the defendant could avail himself of in the federal jurisdiction; and fourth, whether the bringing in of a nonresident defendant by attachment is such a substantial right as to amount to more than mere procedure.

[fol. 75] Until these primary issues have been answered by the majority, we hardly feel that the case has been given the consideration it deserves. Each of the issues has been fully discussed and ably considered by Judge Graves in the dissenting opinion, and we feel that the conclusions he has reached are unanswerable. In fact, were it not from certain expressions in the opinion of Judge Graves it would not have occurred to us that the majority intended to hold that the right to sue the initial carrier for the negligence of its connections existed prior to the passage of the Carmack Amendment, or that your Honors intended to hold that the Carmack Amendment undertook to reserve to the shipper any substantive rights afforded by the state law respecting damage to interstate freight. If the majority have so held, this opinion is in direct conflict with the following authoritative decisions, to wit: Southern Express Co. v. Byers, 240 U. S. 612; Adams Express Co. v. Croninger, 226 U. S. 503, and Lysaght v. Lehigh Valley R. Co., 254 Fed. 351.

In view of the importance of this question, the fact that the important underlying issues have not been discussed in the majority opinion, and the further fact that the two new members of the Court did not hear the oral arguments, we respectfully and sincerely urge the granting of this motion for a rehearing in order that we may attempt to clear up some of the confusion that appears to exist.

Respectfully submitted, Jas. F. Green, H. H. Larimore, Thos. T. Railey, Attorneys for Relator.

[fol. 76] And thereafter, on the 28th day of April, 1923, the following further proceedings were had and entered of record in said cause, to-wit:

IN THE SUPREME COURT OF MISSOURI, APRIL TERM, 1923

In Banc

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING

Now at this day, on consideration of the motion for a rehearing herein, heretofore filed by the said relator, it is ordered by the Court that said motion be, and the same is hereby, overruled.

[fol. 77] IN THE SUPREME COURT OF MISSOURI

And thereafter, on the 23rd day of May, 1923, *Hon.* A. M. Woodson, Chief Justice, made an order allowing a writ of error in said cause, which said order is in the words and figures following, to-wit:

[Title omitted]

ORDER ALLOWING WRIT OF ERROR

Writ of error allowed in the above-entitled cause, upon the execution of a bond on behalf of petitioner in the sum of one thousand dollars, said bond when approved to act as a supersedeas herein.

Dated this 23rd day of May, 1923.

A. M. Woodson, Chief Justice, Supreme Court of Missouri.

[fols. 78 & 79] Copy

IN THE SUPREME COURT OF MISSOURI, APRIL TERM, 1923

En Banc

[Title omitted]

BOND ON WRIT OF ERROR [for $1,000; approved, Woodson, J.; omitted in printing]

Endorsed on cover: File No. 29,686. Missouri Supreme Court Term No. 376. State of Missouri ex rel. The St. Louis, Brownsville and Mexico Railway Company, plaintiff in error, vs. Wilson A. Taylor, judge of the Circuit Court of the City of St. Louis. Filed June 18th, 1923. File No. 29,686.